VW Cars Sdn Bhd v Volkswagen Group Malaysia Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-140 OF 2010
MAH WENG KWAI J
16 DECEMBER 2011

Civil Procedure — Trial — Procedure — Whether court should exercise its discretion to direct defendant to begin — Whether defendant should bear burden of proving breach of agreement — Rules of the High Court 1980 O 35 r 4

Contract — Breach — Agreement — Whether plaintiff in breach of dealer agreements — Whether defendant's notice terminating dealer agreements was unlawful and void — Whether defendant could refer to other breaches apart from two breaches stated in notice of termination — Whether dealer agreements should be considered separately — Whether plaintiff was in breach of its obligation not to market and/or sell VW vehicles and parts and accessories outside territory of responsibility — Whether it was proven on balance of probabilities that plaintiff was in breach of its obligation not to market and/or sell VW vehicles from showroom of another separate legal entity — Counterclaim — Whether proven

The defendant, the representative and supplier of Volkswagen vehicles ('VW vehicles'), vehicle parts and accessories in Malaysia, entered into two dealer agreements with the plaintiff, namely the Federal Highway dealer agreement ('FHD agreement') and the Mutiara Damansara dealer agreement (MDD agreement). Under the dealer agreements the plaintiff was authorised to sell VW vehicles, vehicle parts and accessories or provide after sales service directly to car buyers in the territory allocated to it, which was the Petaling Jaya area (the PJ area). When the defendant discovered that the plaintiff had acted in breach of the dealer agreements, in that, it had marketed and/or sold VW vehicles in a showroom that belonged to Cartrade Sdn Bhd (Cartrade), in breach of article 3 of the dealer agreements, and that it had modified the VW vehicles without the prior written approval of the defendant, in breach of article 4 of the dealer agreements, it gave the plaintiff written notice to terminate the dealer agreements with immediate effect. The plaintiff denied acting in breach of articles 3 and 4 of the dealer agreements. The plaintiff thus commenced the present action against the defendant wherein it claimed that the notice terminating the dealer agreements was unilateral and unlawful. By way of this action the plaintiff claimed, inter alia, for loss, expenses and damages in the sum of RM305,580,742.32 and general damages to be assessed. It was the plaintiff's case that since the territory of responsibility in the FHD agreement had been left blank, the plaintiff could not be found to be in breach

of article 3 of the dealer agreements for the marketing and/or sale of VW vehicles outside of the territory of responsibility. As such, the plaintiff contended that article 3 of the dealer agreements was void and of no contractual effect. Besides the two grounds stated in the notice of termination, the defendant sought to rely on four other breaches pleaded in its amended defence as further grounds to terminate the dealer agreements. The defendant also counterclaimed for the monies owed to it by the plaintiff, inter alia, under its corporate identity and corporate design (CICD) leasing agreements and the supply of VW vehicles and parts on credit. The plaintiff responded that the defendant should not be allowed to rely on any other breaches, besides the two breaches stated in the notice of termination to prove its case. The plaintiff also contended that since the defendant had unlawfully terminated the dealer agreements it bore the burden to prove that the termination was in compliance with the dealer agreements.

Held, dismissing the plaintiff's claim with costs and allowing the defendant's counterclaim with interest and costs:

(1) By using the words 'inter alia' in its notice of termination, the defendant had evinced an intention to refer to other breaches apart from the two breaches that were specifically stated in the notice of termination. The defendant was accordingly allowed to adduce evidence to prove the other breaches provided they fell within the four corners of the defendant's pleadings (see para 12).

(2) The court agreed that as the defendant had claimed that the termination of the dealer agreements was valid, it bore the burden to prove on a balance of probabilities that the plaintiff had in fact breached the dealer agreements. As such, the court exercised its discretion under O 35 r 4 of the RHC 1980 and directed the defendant to begin the case even though ordinarily it was the plaintiff which should begin its case (see para 13).

(3) The court was of the view that the two dealer agreements, i.e. the FHD agreement and the MDD agreement, should be considered separately and not lumped together. This is because although the territory of responsibility had not been stipulated in the FHD agreement, it had been defined in the MDD agreement. Based on the evidence and the submissions of the parties it was found that the plaintiff was in breach of its obligation not to market and/or sell VW vehicles and VW vehicle parts and accessories outside the territory of responsibility of PJ insofar as the MDD agreement was concerned (see para 16).

(4) The evidence of the defendant's witnesses, which was accepted as credible, proved that the plaintiff had operated a VW dealership at Cartrade's showroom without the approval of the defendant. As such, the plaintiff was in breach of its obligation not to market and/or sell VW vehicles from the showroom of another separate legal entity ie the

Cartrade showroom, as provided for in both the dealer agreements. Even if there was no sale within the meaning of s 4 of the Sales of Good Act 1957 ('SOGA'), the plaintiff was in breach for having promoted and marketed VW vehicles from Cartrade's showroom. Further, based on the evidence the defendant had proved on a balance of probabilities that the plaintiff had carried out modifications on the VW vehicles without the prior written consent of the defendant. In view of the breaches by the plaintiff of articles 3 and 4 of the dealer agreements, the court found that the defendant was lawfully and sufficiently justified in terminating the dealer agreements. The court thus dismissed the plaintiff's claim against the defendant (see para 20).

(5) The court found the plaintiff indebted to the defendant, inter alia, for the CICD agreements and the balance sum of supply parts. The court also ordered the plaintiff to comply with the post-termination obligations as prayed for by the defendant in its amended defence and counterclaim (see para 30).

[Bahasa Malaysia summary

Defendan, wakil dan pembekal kenderaan-kenderaan Volkswagen ('kenderaan-kenderaan VW'), bahagian-bahagian kenderaan dan aksesori di Malaysia, telah memeterai dua perjanjian pengedaran dengan plaintif, iaitu perjanjian Pengedaran Lebuhraya Persekutuan ('perjanjian PLP') dan perjanjian Pengedaran Mutiara Damansara (perjanjian PMD). Di bawah perjanjian pengedaran, plaintif diberikan kuasa untuk menjual kenderaan-kenderaan VW, bahagian kenderaan dan aksesori atau menyediakan perkhidmatan selepas jualan terus kepada pembeli kereta dalam wilayah yang diperuntukkan kepadanya, iaitu kawasan Petaling Jaya ('kawasan PJ'). Apabila defendan mendapati bahawa plaintif telah bertindak melanggar perjanjian pengedaran, di mana, ia telah memasarkan dan/atau menjual kenderaan VW di bilik pameran yang dipunyai oleh Cartrade Sdn Bhd ('Cartrade'), melanggar artikel 3 perjanjian pengedaran, dan bahawa ia telah mengubahsuai kenderaan-kenderaan VW tanpa kelulusan bertulis terlebih dahulu daripada defendan, melanggar artikel 4 perjanjian pengedaran, ia memberikan plaintif notis bertulis untuk menamatkan perjanjian pengedaran berkuat kuasa serta-merta. Plaintif menafikan bertindak melanggar artikel 3 dan 4 perjanjian pengedaran. Oleh itu, plaintif memulakan tindakan ini terhadap defendan di mana ia mendakwa bahawa notis yang menamatkan perjanjian pengedaran adalah unilateral dan menyalahi undang-undang. Dengan cara tindakan ini plaintif menuntut, antara lainnya, bagi kerugian, perbelanjaan dan ganti rugi berjumlah RM305,580,742.32 dan ganti rugi am untuk ditaksir. Adalah menjadi kes plaintif bahawa memandangkan wilayah tanggungjawab dalam perjanjian PLP telah ditinggalkan kosong, plaintif tidak boleh didapati melanggar artikel 3 perjanjian pengedaran tersebut bagi pemasaran dan/atau penjualan kenderaan-kenderaan VW di luar wilayah

tanggungjawab. Oleh itu, plaintif menghujahkan bahawa artikel 3 perjanjian pengedaran adalah tidak sah dan tiada memberi kesan kontrak. Selain dua alasan yang dinyatakan dalam notis penamatan, defendan cuba bersandarkan kepada empat pelanggaran lain yang diplidkan dalam pembelaan terpinda sebagai alasan lanjut untuk menamatkan perjanjian pengedaran. Defendan juga menuntut balas wang yang terhutang kepadanya oleh plaintif, antara lain, di bawah perjanjian pajakan identiti korporat dan reka bentuk korporat ('IKRK') dan bekalan kenderaan-kenderaan VW dan bahagian-bahagian secara kredit. Plaintif membalas bahawa defendan tidak sepatutnya dibenarkan bersandar kepada mana-mana pelanggaran yang lain, selain dua pelanggaran yang dinyatakan dalam notis penamatan untuk membuktikan kesnya. Plaintif juga menghujahkan bahawa memandangkan defendan telah menamatkan perjanjian pengedaran secara tidak sah, ia memikul beban untuk membuktikan bahawa penamatan tersebut mematuhi perjanjian pengedaran.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan dengan faedah dan kos:

(1) Dengan menggunakan perkataan 'inter alia' dalam notis penamatan, defendan telah menunjukkan dengan jelas niat untuk merujuk kepada pelanggaran lain selain daripada dua pelanggaran yang dinyatakan secara khusus dalam notis penamatan. Defendan telah dibenarkan dengan sewajarnya untuk mengemukakan keterangan membuktikan pelanggaran lain dengan syarat kesemuanya jatuh dalam empat penjuru pliding defendan (lihat perenggan 12).

(2) Mahkamah bersetuju bahawa kerana defendan telah mendakwa bahawa penamatan perjanjian pengedaran adalah sah, ia memikul beban untuk membuktikan atas imbangan kebarangkalian bahawa plaintif telah sebenarnya melanggar perjanjian pengedaran. Dengan itu, mahkamah menjalankan budi bicaranya di bawah A 35 k 4 KMT 1980 dan mengarahkan defendan untuk memulakan kes tersebut walaupun lazimnya plaintif yang harus memulakan kesnya (lihat perenggan 13).

(3) Mahkamah berpendapat bahawa kedua-dua perjanjian pengedaran, iaitu perjanjian PLP dan perjanjian PMD, perlu dipertimbangkan secara berasingan dan tidak dilonggokkan bersama. Ini adalah kerana walaupun wilayah tanggungjawab tidak ditetapkan dalam perjanjian PLP, ia telah ditakrifkan dalam perjanjian PMD. Berdasarkan keterangan dan hujah-hujah pihak-pihak, didapati bahawa plaintif telah melanggar obligasinya untuk tidak memasarkan dan/atau menjual kenderaan-kenderaan VW dan bahagian-bahagian kenderaan-kenderaan VW dan aksesori di luar wilayah tanggungjawab PJ setakat perjanjian PMD berkenaan (lihat perenggan 16).

(4) Keterangan saksi defendan, yang telah diterima sebagai boleh dipercayai, membuktikan bahawa plaintif telah mengendalikan pengedaran VW di

bilik pameran Cartrade tanpa kelulusan defendan. Oleh itu, plaintif melanggar obligasi untuk tidak memasarkan dan/atau menjual kenderaan-kenderaan VW dari bilik pameran entiti undang-undang lain yang berasingan, iaitu bilik pameran Cartrade, sebagaimana yang diperuntukkan dalam kedua-dua perjanjian pengedaran. Walaupun tidak ada jualan dalam maksud s 4 Akta Jualan Barang 1957 ('AJB'), plaintif telah melakukan pelanggaran dengan mempromosikan dan memasarkan kenderaan-kenderaan VW dari bilik pameran Cartrade. Selanjutnya, berdasarkan keterangan, defendan telah membuktikan atas imbangan kebarangkalian bahawa plaintif telah menjalankan pengubahsuaian pada kenderaan-kenderaan VW tanpa kebenaran bertulis terlebih dahulu daripada defendan. Melihat pada pelanggaran artikel 3 dan 4 perjanjian pengedaran oleh plaintif, mahkamah mendapati bahawa defendan sah dan cukup wajar dalam menamatkan perjanjian pengedaran. Oleh itu, mahkamah menolak tuntutan plaintif terhadap defendan (lihat perenggan 20).

(5) Mahkamah mendapati plaintif berhutang kepada defendan, antara lainnya, bagi perjanjian IKRK dan jumlah baki bekalan bahagian-bahagian. Mahkamah juga memerintahkan plaintif untuk mematuhi obligasi selepas pemecatan seperti yang telah dipohon oleh defendan dalam pembelaan terpinda dan tuntutan balas (lihat perenggan 30).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2926–2936.

For cases on procedure, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8820–8824.

Cases referred to

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Lo Khi On (Trading as Fuji Hairdressing Saloon) v Tanjong Aru Hotel Sdn Bhd [1994] 3 MLJ 766; [1994] 4 CLJ 550, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 35 r 4, 4(1), (2), (6)
Sale of Goods Act 1957 s 4

S Ramesh (Gary Yap and CY Liew with him) (Adnan Sundra & Low) for the plaintiff.

Ariff Rozhan (William Lim Wee Chong and Johnson Lim Fung Tat with him) (Zaid Ibrahim & Co) for the defendant.

Mah Weng Kwai J:

BRIEF FACTS

[1] The defendant is a wholly owned subsidiary of Volkswagen AG of Germany and is the representative and supplier of Volkswagen (VW) vehicles, parts and accessories in Malaysia.

[2] The defendant however does not sell VW vehicles, parts and accessories or provide after sales services directly to car buyers in Malaysia. To do so, the defendant appoints independent authorised dealers.

[3] The defendant appointed Cartrade Sdn Bhd ('Cartrade') as one of its independent authorised dealers and entered into a dealer agreement on 21 August 2006 in respect of the Federal Highway, Petaling Jaya outlet. The plaintiff was incorporated on 22 August 2006 to supercede Cartrade. The defendant entered into another dealer agreement with the plaintiff on 30 May 2007 in respect of the Mutiara Damansara, Petaling Jaya outlet.

[4] Cartrade carried on the business of selling cars and accessories at its showroom at No 73, Jalan Maarof, Bangsar, Kuala Lumpur known as Cartrade-ABT's showroom.

[5] On 4 November 2009 the defendant gave written notice to the plaintiff to terminate the two dealer agreements with immediate effect. The notice of termination stated as follows:

> We have in our possession evidence to confirm that VW Cars Sdn Bhd ('VW Cars') have committed, inter alia, the following breaches of the Dealer Agreements namely:
>
> (a) unauthorised marketing and/or selling of VW vehicles at Cartrade-ABT's showroom at 73, Jalan Maarof, Bangsar, Kuala Lumpur in breach of Article 3 of the Dealer Agreements;
>
> (b) modification of VW vehicles without our prior written approval, in breach of Article 4 of the Dealer Agreements.

THE PLAINTIFF'S CASE

[6] The plaintiff contended, inter alia, that:

(a) the notice of termination dated 4 November 2009 terminating the dealer agreements in respect of the Federal Highway dealer agreement and the Mutiara Damansara dealer agreement was unilateral and unlawful;

(b) the defendant, who had allegedly terminated the contract unlawfully, bore the burden to prove that the termination was in compliance with the dealer agreements and was lawful and as such the defendant should begin the trial; and

(c) the defendant should not be allowed to rely on any other breaches, besides the two breaches stated in the notice of termination to prove its case against the plaintiff.

[7] The plaintiff denied that it had marketed and/or sold VW vehicles at Cartrade-ABT's showroom or had modified VW vehicles without the prior written approval of the defendant in breach of articles 3 and 4 of the dealer agreements respectively.

[8] The plaintiff also contended that as Appendix 3 of the Federal Highway dealer agreement, pertaining to the 'Territory of Responsibility', was left blank it could not be implied that the business of the plaintiff under that dealer agreement ought to be confined to the 'territory' of Petaling Jaya only.

THE DEFENDANT'S CASE

[9] The defendant contended that it had properly and validly terminated the dealer agreements based on the notice of termination dated 4 November 2009 pursuant to article 3 paras 6 and 7 and article 4 para 3, respectively.

[10] Apart from relying on the two grounds stated in the notice of termination, the defendant sought to rely on four other breaches pleaded in paras 7.1 and 14 of the amended defence and counterclaim as further grounds to terminate the dealer agreements, namely:

(a) continuously failing to pay, despite repeated reminders, for the Volkswagen Contractual Products supplied by the Defendant to the Plaintiff, in breach of Article 26 paragraph 5 of the Dealer Agreements;

(b) refusing to make available complete customer database to the Defendant, despite receiving notice to do so from the Defendant, contrary to Article 13 paragraph 6(c) of the Dealer Agreements;

(c) failing to achieve the Dealer Performance Standard, despite receiving notice to do so from the Defendant, in breach of Article 15 of the Dealer Agreements;

(d) failing to provide sales and/or after sales services of satisfactory quality to the customers of Volkswagen Contractual Products, and failing to remedy the same, despite receiving notice to do so from the Defendant, contrary to Article 1 paragraph 2 and Article 6 paragraph 1 of the Dealer Agreements.

The defendant contended that it could lawfully rely on the other breaches as it had clearly used the words 'inter alia' in the notice of termination.

[11] The defendant further contended that it was entitled to terminate the dealer agreements with immediate effect pursuant to article 26 paras 5 and/or 8 of the dealer agreements if:

(a) the Plaintiff had operated, sold OR marketed new unregistered Volkswagen vehicles from Cartrade-ABT's Showroom without the prior consent of the Defendant, in breach of Article 3 paragraphs 6 and 7 of the Dealer Agreements; OR

(b) the Plaintiff had sold new unregistered Volkswagen vehicles together with ABT Kits and modification without the prior consent of the Defendant, in breach of Article 4 paragraph 3 of the Dealer Agreements.

COURT'S RULING ON THE TWO PRELIMINARY ISSUES

[12] On 24 February 2011 the court accepted the submission of counsel for the defendant on the import of and significance in the use of the words 'inter alia' in the notice of termination. By using these words the defendant had envinced an intention to refer to other breaches apart from the two breaches stated in the notice of termination. The words are not mere surplusage. And the defendant had in fact proceeded to plead the four other breaches in paras 7.1 and 14 of the amended defence and counterclaim. The defendant was accordingly allowed to adduce evidence to prove the other breaches provided they fell under the events of default as stated in article 26 and were confined to the four corners of the defendant's pleadings. As a decision had been made on the matter it was not open to the court to review or revisit its earlier decision at the end of the trial (see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 where it was held by the Court of Appeal that 'once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened').

[13] The second ruling was in respect of the burden of proof issue. The court agreed with counsel for the plaintiff that as it was the defendant who had claimed that the termination of the dealer agreements was lawful, the burden was on the defendant to prove it. Ordinarily it is the plaintiff who should begin his case pursuant to O 35 r 4(2) of the Rules of the High Court 1980 (RHC) but there are exceptions, one of which is O 35 r 4(6) and the other is the discretion granted to the court under O 35 r 4(1) to direct who should begin (see *Lo Khi On (Trading as Fuji Hairdressing Saloon) v Tanjong Aru Hotel Sdn Bhd* [1994] 3 MLJ 766; [1994] 4 CLJ 550). The court therefore allowed the oral application of counsel for the plaintiff under O 35 r 4 of the RHC 1980 and directed the defendant to begin the case. With the ruling, the burden of proof shifted to the defendant to prove on a balance of probabilities that the

plaintiff had in fact breached the dealer agreements.

DECISION OF THE COURT

[14] Upon hearing the evidence of the witnesses for the defendant and the plaintiff at the full trial and upon reading the very lengthy written submissions of counsel for the defendant and the plaintiff and upon hearing counsel aforesaid, it was the decision of the court that the defendant had on a balance of probabilities, proved that the plaintiff had operated, marketed and/or sold new unregistered VW vehicles from Cartrade-ABT's showroom in Jalan Bangsar without the prior consent of the defendant in breach of article 3 paras 6 and 7 of the dealer agreements and that the plaintiff had sold new unregistered VW vehicles together with ABT Kits and modification without the prior consent of the defendant in breach of article 4 para 3 of the dealer agreements.

REASONS FOR THE DECISION

Territory of responsibility

[15] Article 2 para 9 of the dealer agreements defines the territory of responsibility as:

> Territory of Responsibility as used in this Agreement is the territory set forth in Appendix 3.

Appendix 3 of the Mutiara Damansara dealer agreement reads:

> Appendix 3: Territory of Responsibility. The Territory of Responsibility is the territory defined below:
>
> Petaling Jaya.

However, Appendix 3 of the Federal Highway dealer agreement only reads:

> Appendix 3: Territory of Responsibility. The Territory of Responsibility is the territory defined below:
>
> [blank].

[16] Counsel for the plaintiff submitted that since Appendix 3 of the Federal Highway dealer agreement did not state the territory of responsibility, article 3 is void of any contractual effect and the plaintiff cannot be found to be in breach of the dealer agreement for the marketing and/or sale of VW vehicles and accessories outside of the territory of responsibility when the territory of responsibility has not even been defined in the Federal Highway dealer

agreement. To begin with, the court is of the view that the two dealer agreements should not be lumped together. The operation of Appendix 3 of the Federal Highway dealer agreement and that of Appendix 3 of the Mutiara Damansara dealer agreement should be viewed and considered separately. This is simply because the territory of responsibility in the Mutiara Damansara dealer agreement has been defined. Hence, it cannot be said that the plaintiff cannot be found to be in breach of the Mutiara Damansara dealer agreement for the marketing and/or sale outside of the territory of responsibility of Petaling Jaya.

[17] However, the same may not be said of the Federal Highway dealer agreement. Appendix 3 was left blank and according to Basharuddin bin Abdullah (DW7) it was inadvertently omitted, whereas Sulaiman @ Mohamed Helmi bin Mohd llyas (PW1) said that the reason for the omission was to allow the plaintiff an open market in Malaysia. Whatever the reason, the fact remains that there is no territory of responsibility stipulated for the Federal Highway dealer agreement. The court is of the view that there can be no addition to, substitution or amendment of Appendix 3 of the Federal Highway dealer agreement to imply that the territory of responsibility of the Federal Highway dealer agreement must be restricted to Petaling Jaya just because the location of the Federal Highway outlet at Lot 3, Jalan 219, off Federal Highway Petaling Jaya, comes within the jurisdiction of Majlis Bandaraya Petaling Jaya or from the past conduct and relationship of the parties. This is because the Federal Highway dealer agreement is subject to the entire agreement clause in article 29, para 3, where it is stated that the written terms are the only terms of the dealer agreement and precludes the reference to any collateral warranty, prior statements or agreements or past conduct of the parties. No evidence was adduced to show that there was an agreement in writing between the parties to modify or amend Appendix 3 of the Federal Highway dealer agreement, as is required by article 29 para 1 of the Federal Highway dealer agreement. Further, as the Federal Highway dealer agreement is a form of contract of the defendant, any ambiguity on the operation and effect of Appendix 3 in the Federal Highway dealer agreement should be construed against the defendant under the contra proferentum rule. As a consequence of the omission of the territory of responsibility, the plaintiff was not restricted to any territory of responsibility in the Federal Highway dealer agreement.

As the two dealer agreements are to be considered separately, the omission of the territory of responsibility in the Federal Highway dealer agreement has no bearing on the right of the defendant to terminate the Mutiara Damansara dealer agreement as the territory of responsibility of Petaling Jaya was clearly stated in Appendix 3 therein.

[18] However, the issue of the territory of responsibility does not end there. This is due to article 3 para 6 of the dealer agreements which provides that the

plaintiff is *prohibited* from operating, marketing and/or selling new unregistered VW vehicles from the showroom of another separate legal entity article 3 para 6 states as follows:

> Other than the legal entity as stated in Appendix 1 of this Agreement, the establishment within and outside the Territory of Responsibility of any legal entities for marketing the Contractual Products and providing after sales services therefore, even under different ownership ratios, as well as the setting up of branch operations, including showrooms, and display..is prohibited, unless the Supplier has given prior written approval.

It is an undisputed fact that the Cartrade-ABT's showroom belongs to Cartrade, a separate legal entity.

[19] The primary issue to be determined by the court in this case was whether the plaintiff had operated, marketed or sold new unregistered VW vehicles from Cartrade-ABT's showroom in Bangsar, Kuala Lumpur. If the court held that it did, then the plaintiff would be in breach of its obligation not to do so outside of its territory of responsibility of Petaling Jaya in so far as the Mutiara Damansara dealer agreement is concerned and in breach of its obligation not to do so from the showroom of another separate legal entity as provided for in both the dealer agreements.

[20] From the evidence adduced at trial the court found as of fact that the plaintiff *did* operate, market and/or sell new unregistered VW vehicles from outside of its territory of responsibility in the Mutiara Damasara dealer agreement and *did* operate, market and/or sell new unregistered VW vehicles from Cartrade-ABT's showroom. The factual scenarios established are as follows:

(a) Operating and marketing by the plaintiff from Cartrade-ABT's showroom

(i) Evidence of Patrick Yap Min Leong (DW1) — sales manager of the plaintiff from mid 2008 to March 2010.

DW1 testified that towards the end of 2008/early 2009, he and his sales team were transferred by the plaintiff to Cartrade-ABT's showroom in Bangsar where the sales operation of VW vehicles took place. His scope of work and that of his team was to sell, promote and market both registered and unregistered VW vehicles. DW1 worked with other employees and sales manager of the plaintiff at Cartrade-ABT's showroom.

(ii) Evidence of Chew Kah Jun (DW2) — salesman.

DW2 testified that he was mainly based at Cartrade-ABT's showroom and his job was to promote, market and sell all types of VW vehicles,

including unregistered and pre registered VW vehicles. DW2 worked with Nani, another salesman and both reported to Ravinder at Cartrade-ABT's showroom.

DW2 also testified that he was given business cards by the plaintiff which contained his name and description as sales consultant, the vw logo, the plaintiff's name, the telefax and telephone numbers and address of Cartrade-ABT's showroom at Bangsar and that he had given out his business cards to customers at Cartrade-ABT's showroom.

(iii) Evidence of Ahmad Fauzi bin Ithnin (DW5) — senior sales consultant and sales manager of the plaintiff from December 2006 to early 2010.

DW5 testified that when he worked at Cartrade-ABT's showroom, he continued to promote, market and sell both pre registered and unregistered VW vehicles to walk-in customers besides also promoting, marketing and selling ABT Kits and 'ECU upgrades'.

DW5 also testified that at the material time pre registered and new unregistered VW vehicles were displayed at Cartrade-ABT's showroom.

The evidence of DW1, DW2 and DW5 clearly showed that VW vehicles were at the material time displayed at the Cartrade-ABT's showroom for sale and that the salespersons were actively involved in the promotion and marketing of VW vehicles for sale in Bangsar. The reason why DW2 was given his business cards by the plaintiff was obviously to help promote and market the VW vehicles.

The evidence of DW1, DW2 and DW5 remained largely unshaken despite extensive cross-examination by counsel for the plaintiff. Although the three witnesses were all former employees of the plaintiff, there was no evidence to suggest that they were giving unfavourable evidence against the plaintiff out of dislike or disagreement with the plaintiff or had an axe to grind. In fact all of them said that they had left the employment of the plaintiff on good or amicable terms.

The evidence of these three witnesses was accepted by the court as being credible and unrebutted. It proved that the plaintiff had operated a VW dealership branch at Cartrade-ABT's showroom with full time staff employed without the consent or approval of the defendant. After all, the three witnesses as salespersons stationed in Bangsar were in the best position to know themselves that they had promoted and marketed VW vehicles for sale at the Cartrade-ABT's showroom.

(b) Sale of VW vehicles bv the plaintiff from Cartrade-ABT's showroom

(i) Counsel for the plaintiff submitted that as the dealer agreements do not define what a sale is and as cars are goods, reference should be made to the Sale of Goods Act 1957 to interpret the meaning of 'Sale'.

Section 4 of the Sale of Goods Act 1957 provides:

A (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

B Counsel submitted that as the 'sale transaction' involved hire purchase companies, the property in the VW vehicles did not pass to the buyer but to the hire purchase company upon payment by the hire purchase company of the whole or balance of the purchase price to the plaintiff and as such there is no sale between the plaintiff and the buyer. That may C be so upon a strict interpretation of s 4 of the Sale of Goods Act 1957 but in any event, at law, there is a sale between the plaintiff and the hire purchase company. It is trite that while the hire purchase company only claims ownership of the car, the company does not become the registered owner. It is the buyer that becomes the registered owner of the car. In any D event a sale would have taken place at the plaintiff's Cartrade-ABT's showroom.

The court is of the view that once a sale has taken place, albeit to the hire purchase company the plaintiff will be in breach of article 3 para 7 of the E dealer agreement which prohibits the '… sales and marketing of Contractual Products (including cars) outside the Territory of Responsibility' by the plaintiff without the defendant's prior written approval, at least in so far as the Mutiara Damansara dealer agreement is concerned.

F The legal distinction made by counsel for the plaintiff is a very fine distinction in the circumstances, as it is generally known in the motor industry of which the court can takes notice, is that it is the buyer who selects the car, pays a deposit or down payment (if any), attends to the necessary paper work and if required makes an application to a hire G purchase company for finance before he can become the registered owner of the car. For all intents and purposes it is the prospective buyer who is buying the car, not the hire purchase company.

(ii) Evidence of DW1

H DW1 testified that the plaintiff had sold new unregistered VW vehicles from Cartrade-ABT's showroom. Documents to prove that car sales had indeed taken place in Bangsar were invoices and retail customer orders shown in bundle B1 at pp 229, 230, 233–236, 239 and 240.

DW1 also testified that he personally attended to two buyers who I purchased VW vehicles at Cartrade-ABT's showroom namely, Thilakan s/o S Ramalingam and Amirudin bin Abdul Jalil. Buyer Thilakan's name appears on the invoice and retail customer orders at bundle B1 pp 229 and 230 and while buyer Amiruddin's name appears on the invoice and retail customers orders at bundle B1 pp 235 and 236.

DW1 further testified that the VW vehicles sold from Cartrade-ABT's showroom were delivered to the buyers at the showroom, including the VW car purchased by Thilakan.

(iii) Evidence of DW2

DW2 in his evidence also confirmed that he had sold VW vehicles at Cartrade-ABT's showroom.

(iv) Evidence of DW5

DW5 testified that the plaintiff had sold new unregistered VW vehicles form Cartrade-ABT's showroom. He had signed the retail customer orders at bundle B1 p 260 at Cartrade-ABT's showroom and his name appears in the salesman's column in the retail customer orders.

DW5 also testified that he had personally promoted, marketed and sold a new unregistered VW Golf GTI together with ABT accessories and upgrades to buyer Mok Weng Fu at Cartrade-ABT's showroom. The invoice issued for the sale bore the initials 'BGSR' denoting that the sale took place at Cartrade-ABT's showroom at Bangsar (bundle B1 pp 259 and 265).

DW5 further testified that he had received the booking deposit and the full down payment for the VW Golf GTI from Mok Weng Fu at Cartrade-ABT's showroom. Receipts for the payments were issued from the receipt book of Cartrade-ABT's showroom.

DW5 confirmed that he was the salesperson who had personally delivered the VW Golf GTI to Mok Weng Fu at Cartrade-ABT's showroom on or about 31 July 2009.

From the above evidence, it is abundantly clear that the plaintiff had promoted, marketed and sold VW vehicles from Cartrade-ABT's showroom. The salespersons were stationed in Bangsar, they had attended to customers, finalised deals, issued receipts, invoices and retail customer orders and delivered cars to buyers all at Cartrade-ABT's showroom. In total, six new unregistered VW vehicles were sold by the plaintiff from Cartrade-ABT's showroom. The invoices and retail customer orders can be seen in bundle B1 pp 229,230, 233 to 236, 239, 240, 259, 260, 265 and 266. The address and name of Cartrade-ABT's showroom appear at the top right hand corner of the invoices and retail customer orders. The name and/or signature of the plaintiff's salesman who sold the car and of the sales manager appear at the bottom of the invoices and retail customer orders. Further the invoices at bundle B1 pp 259 and 265 (bottom) show that the receipts were issued from Cartrade-ABT's showroom. The court was not persuaded by the plaintiff's evidence that the receipts were wrongly issued from Cartrade-ABT's showroom due to administrative mistakes made by its accounts staff.

The court agreed with and accepted the submission of counsel for the defendant that the sale and purchase of a new and unregistered car by a

dealer, such as the sale and purchase of WV vehicles from Cartrade-ABT's showroom, is a continuing process comprising of various stages in the transaction. It is certainly not as straight forward as buying candy across the counter in a convenience store. The court is of the view that for the purpose of interpreting a 'sale' in the dealer agreements, the sale is a continuing process which takes place when a prospective buyer having selected his car, pays the deposit/booking fee/down payment to the salesman who then issues the receipt, invoice and retail customer order, attends to the financing by a hire purchase company if required, right up to the registration, pre delivery inspection (PDI) and physical handing over of the car to the buyer.

(v) Finding of the court

Upon a consideration of all the evidence adduced, the court found as of fact and of law that:

(A) the plaintiff had promoted, marketed and sold VW vehicles from Cartrade-ABT's showroom, Bangsar in breach of article 3 para 7 of the Mutiara Damansara dealer agreement in that the plaintiff had done so outside the territory of responsibility of Petaling Jaya;

(B) the plaintiff had promoted, marketed and sold VW cars from Cartrade-ABT's showroom, Bangsar in breach of article 3 para 6 of the Mutiara Damansara dealer agreement and Federal Highway dealer agreement in that the plaintiff had done so from the showroom of another legal entity; and

(C) even, taking for a moment that there was no sale within the meaning of s 4 of the Sale of Goods Act, the plaintiff was in breach for having promoted and marketed VW vehicles from Cartrade-ABT's showroom.

(c) Modification of VW vehicles by plaintiff

Article 3 para 4 of the dealer agreements prohibits the plaintiff from modifying contractual products (including VW vehicles) without the prior written consent of the defendant *before* the vehicles have been purchased.

It is common ground between the plaintiff and the defendant that modifications could only be made to the VW vehicles *after* they were fully paid for and registered in the buyers' names. This was agreed to in evidence by PW1. The reason why the plaintiff was prohibited from carrying out modifications to the VW vehicles before registration was because any modifications made to new unregistered VW vehicles may affect the warranty provided by the defendant.

The plaintiff denied that modifications were made to the VW vehicles before their registration. However the evidence adduced by the defendant showed otherwise.

Evidence of Modifications

(i) 19 invoices and retail customer orders (bundle B1 pp

229–265) issued by the plaintiff from Cartrade-ABT's showroom, the Federal Highway showroom and Mutiara Damansara showroom clearly showed that modifications were performed on the VW vehicles. The details of the ABT Kits and modifications formed part of the invoices and retail customer orders;

(ii) buyers had applied for hire purchase financing including the cost of the ABT Kits and modifications. A hire purchase company would only agree to finance the ABT Kits and modifications *after* they had been installed. This would mean that the modifications would have been made *before* the VW vehicles were registered. Indeed as testified by DW7, if a hire purchase company pays for modifications which had not been carried out, this would be tantamount to a fraud perpetuated on the company;

(iii) if modifications were performed on VW vehicles by Cartrade-ABT's showroom after they had been registered, a separate invoice would be issued with the price and description of the ABT Kits and modification stated therein, as alleged by DW1 in evidence. However, no such invoices were produced by the plaintiff. The inference is that the modifications were carried out by Cartrade-ABT's showroom *before* registration or that the modifications were done by the plaintiff rather than by Cartrade-ABT.

(iv) DW5 had testified that some of the new unregistered VW vehicles fitted with ABT Kits and modifications were in fact displayed at Cartrade-ABT's showroom.

(d) Finding of the court

The court was satisfied, on a balance of probabilities, from the evidence that the plaintiff did carry out modifications and installed ABT Kits on VW vehicles *before* registration and without the prior written consent of the defendant.

In view of the breaches by the plaintiff of article 3 paras 6 and 7 and article 4 para 3, the court found that the defendant was lawfully and sufficiently justified in terminating the dealer agreements pursuant to article 26 paras 5 and/or 8 of the said agreements.

In doing so, the court dismissed the plaintiff's claim for loss, expenses and damages in the sum of RM305,580,742.32 and for general damages to be assessed, without having the need to consider the other four breaches complained of by the defendant against the plaintiff.

A

THE DEFENDANT'S COUNTERCLAIM

Sum of RM856,878.97 – for corporate identity and corporate design (CICD) and Special tools

B

[21] Pursuant to several CICD leasing agreements, the defendant leased to the plaintiff VW CICD elements and furniture for their use in their showrooms (bundle B1 pp 202–206 and bundle B2 pp 14–20, 21–24, 25–29, C 30–34 and 35–38) in consideration of the plaintiff paying fixed monthly rentals, which varied from showroom to showroom, and of the plaintiff bearing the cost of installation of the CICD elements and furniture.

D **[22]** Pursuant also to several special tools rental agreements, the defendant leased to the plaintiff special tools and equipment for their use in their service centres (bundle C1 pp 159–171 and bundle C2 pp 1–13, 39–52 and 53–65) in consideration of the plaintiff paying fixed monthly rentals, which varied from showroom to showroom, and of the plaintiff replacing missing tools.

E

[23] The amount owed by the plaintiff is essentially reflected in the defendant's statement of accounts (bundle C1 p 143) and credit and debit notes (bundle C1 pp 4–158) and according to the answers of DW3, the defendant's accounts manager to questions 3–9 in his witness statement, F DWS3.

[24] No evidence was adduced by the plaintiff to rebut the plaintiff's claim.

G **[25]** The CICD leasing agreements and special tools rental agreements are agreements ancillary to the dealer agreements. Further the defendant also claimed from the plaintiff sums owed in respect of the central partner network connection and licence fees and reimbursement for customer free maintenance services.

H

Balance sum of RM29,969.89 for supply of parts

[26] The defendant had supplied the plaintiff with VW vehicles and parts on I credit.

[27] As at the date of the defendant's counterclaim, the sum owed by the plaintiff was RM1,117,260.05 for the supply of VW vehicles and the sum of RM279,969.89 for the supply of parts. However, on 8 September 2010 the

defendant had called on the banker's guarantee and after payment, a balance sum of RM29,969.89 only is due and owing by the plaintiff for the supply of parts.

[28] The balance amount owing by the plaintiff is shown in the defendant's statement of accounts in bundle B2 pp 301–305, bundle C1 pp 253–262, bundle C1 pp 264–300, bundle D2 pp 1–14 and bundle D3 pp 15–20 and according to the answers of DW3 to questions 10–14 in his witness statement, DWS3.

[29] No evidence was adduced by the plaintiff to rebut the defendant's claim.

Sum of RM494,025.08 — for reduction of duty for the Le Tour de Langkawi

[30] In early 2009 the defendant made available VW vehicles to the plaintiff for the plaintiff's participation in the Le Tour de Langkawi. It was agreed that pursuant to an agreement (bundle B2 pp 173 and 174) the plaintiff agreed to pay the defendant 30% of the 25% reduction in the import and excise duty the plaintiff was due to receive from the Government of Malaysia, Langkawi being a duty free port.

[31] The sum of RM494,025.08 due and payable was according to the evidence of DW7 and to the minutes of meeting held on 14 May 2008. The minutes of meeting are in bundle C1 p 249A and bundle C2 p 322.

Again, no evidence was adduced by the plaintiff to rebut this claim as well.

VW trademark

[32] It will be recalled that the first dealer agreement was entered into between Cartrade Sdn Bhd and the defendant. At the request of the defendant, the plaintiff was incorporated to supercede Cartrade Sdn Bhd. The plaintiff's right to use the initial 'VW', the name VW and the VW logo which are the trademarks belonging to the defendant arise from the dealer agreements, in particular article 12 para 2 wherein the plaintiff acknowledges that the defendant is the sole and exclusive proprietor of the marks listed in Appendix 8.

[33] Article 12 para 6(g) and article 27 para 2(a) provide that the plaintiff shall upon the termination of the dealer agreements forthwith cease to use the marks or names of the defendant.

[34] Upon termination of the dealer agreements, the defendant is lawfully

entitled to seek on order to restrain the plaintiff from using the initials VW in its company name and from using any of the defendant's trademarks.

[35] It is plainly obvious that the defendant had agreed to allow the plaintiff to use the initials VW in the company name simply because the plaintiff was to be appointed an authorised dealer of the defendant under the dealer agreements. It was a means to promote the contractual products of the defendant and as far as the plaintiff was concerned it was notice to the world that it was a company authorised to sell VW vehicles and accessories. Otherwise there would have been no reason at all for the defendant to allow the plaintiff to use the initials 'VW' in its company name. The fact that the initials 'VW' were also the first initials of the names of the directors on incorporation namely, Vera Kumar and Wan Ahmad was merely coincidental. Surely, the plaintiff cannot now insist on the retention of the initials 'VW' in its company name when the dealer agreements have been terminated.

FINDING OF THE COURT ON THE COUNTERCLAIM

[36] In view of the evidence considered above the court found as of fact that the plaintiff is indebted to the defendant in the following sums:

(a) RM856,878.97 — for CICD and special tools;

(b) RM29,969.89 — balance sum for supply of parts; and

(c) RM494,025.08 — reduction of duty for Le Tour de Langkawi.

[37] The court also ordered the plaintiff to remove the initials 'VW' from its company name and that the plaintiff be restrained from using the defendant's trademarks and the marks or names of the VW group as listed in Appendix 8 of the dealer agreements.

[38] Further, the court ordered the plaintiff to comply with the post termination obligations as prayed for by the defendant in paras 37(vii)–37(xiii) of the amended defence and counterclaim.

[39] However, no order was made by the court on the defendant's claim for loss of goodwill and reputation as the defendant did not adduce any evidence in support of this claim. In fact, it would appear that the defendant had abandoned this claim in its submissions. If at all, the court notes that the defendant enjoyed increased sales of VW vehicles in Malaysia after the termination of the dealer agreements.

[40] In the result, the plaintiff's claim was dismissed with costs and the defendant's counterclaim was allowed with interest and costs.

Plaintiff's claim dismissed with costs and defendant's counterclaim allowed with interest and costs.

Reported by Kohila Nesan